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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

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No. 614

SETTIMO ACCARDO,

Petitioner,

vs.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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The petitioner, Settimo Accardo, by his attorneys, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Third Circuit which affirmed a judgment of the United States District Court of New Jersey (R. 19a) revoking the American citizenship of petitioner.

Opinions Below

The Court of Appeals affirmed the judgment of the District Court in a *per curiam* opinion (R. 238) which is unreported. The District Court's opinion is reported at

113 F. Supp. 783 and is set forth in the record at pages 9a to 18a.

Jurisdiction

The judgment of the Court of Appeals was entered on December 7, 1953. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

Questions Presented

1. Whether denaturalization upon the ground of fraud may be predicated upon the failure to reveal two disorderly conduct convictions outside the statutory period (during which good moral character must be demonstrated) without proof that such convictions were material and without proof of an intent to deceive.

2. Whether proof sufficient to denaturalize for fraud may be predicated upon the non-disclosure of an arrest which did not result in a conviction.

3. Whether the record before the District Court, consisting of no transcript of the naturalization hearing but only of the naturalization application and the testimony of government witnesses who had no specific recollection of petitioner's testimony in the naturalization proceeding, was sufficient to establish by clear and convincing evidence that petitioner secured his naturalization by fraud.

4. Whether a naturalization judgment may be attacked for intrinsic fraud.

5. Whether petitioner procured his naturalization illegally and whether a judgment of naturalization was illegally procured where a citizen secured such judgment without improper or sinister motive.

6. Whether a naturalization judgment is *res judicata* upon the question of good moral character where such matter was distinctly in issue.

Statutes Involved

Section 307(a) of the Nationality Act of 1940 (8 U. S. C. 707a) provides as follows:

> No person, except as hereinafter provided in this chapter, shall be naturalized unless such petitioner, (1) immediately preceding the date of filing petition for naturalization has resided continuously within the United States for at least five years and within the State in which the petitioner resided at the time of filing the petition for at least six months, (a) has resided continuously within the United States from the date of the petition up to the time of admission to citizenship, and (3) during all the periods referred to in this subsection has been and still is a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States.

Section 311 of the Nationality Act of 1940 (8 U. S. C. 711) provides as follows:

> A person who upon the effective date of this section is married to or thereafter marries a citizen of the United States, or whose spouse is naturalized after the effective date of this section, if such person shall have resided in the United States in marital union with the United States citizen spouse for at least one year immediately preceding the filing of the petition for naturalization, may be naturalized after the effective date of this section upon compliance with all requirements of the naturalization laws with the following exceptions:
>
> (a) No declaration of intention shall be required.
>
> (b) The petitioner shall have resided continously in the United States for at least two years immediately preceding the filing of the petition in lieu of the five-year period of residence within the United States and the six months' period of residence within the State

where the naturalization court is held. Oct. 14, 1940, c. 876, Title I, Sub. chap. III, Sec. 311, 54 Stat. 1145.

Section 338 (a) of the Nationality Act of 1940 [8 U. S. C. 738 (a)] provides as follows:

> It shall be the duty of the United States district attorneys for the respective districts, upon affidavits showing good cause therefor, to institute proceedings in any court specified in subsection (a) of section 701 in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such persons to citizenship and canceling the certificate of naturalization on the ground of fraud or on the ground that such order and certificate of naturalization were illegally procured.

Statement

Petitioner, Settimo Accardo is a native of Italy who entered the United States for permanent residence on January 26, 1938 (R. 183a). On June 24, 1936, he married a native born American citizen and he is the father of three minor American born children (R. 186a). He was naturalized on January 22, 1945 (R. 2a).

Upon the basis of his marriage to an American citizen, petitioner filed his application for naturalization on January 25, 1944, pursuant to 8 U. S. C. 707 and 711, which required proof of good moral character for a two year period. This application did not disclose that petitioner had two disorderly conduct arrests, one occuring in 1930 and one in 1933. The first offense resulted in a $25.00 fine, the latter in a suspended sentence (R. 184a; 235a). At the time of his naturalization, the Immigration Service investigated petitioner's criminal record only back to 1936 (R. 228a, 229a, 235a) and approved his application after referring the issue of his moral character to its Washington office

(R. 230a, 231a). From the petitioner's nondisclosure of these two disorderly conduct convictions in 1930 and 1933, the District Court inferred intent to deceive and materiality—the necessary elements of fraud. This furnished the first ground of the finding that denaturalization for fraud was appropriate (R. 13a). The second basis for a finding of fraudulent naturalization was the alleged failure of petitioner to reveal in open court at the time of naturalization that he was indicted on October 25, 1944, and released upon bail (R. 11a). This 1944 offense was subsequently nolle prossed after petitioner's naturalization (R. 25a-27a). Petitioner, however was under the impression it had been nolle prossed at the time of his naturalization (R. 157a-159a). The sole evidence that petitioner failed to reveal this 1944 indictment, subsequently nolle prossed, was the oral testimony of a naturalization examiner nine years after the naturalization ceremony that he had no specific recollection of the event but that he invariably inquired about intervening arrests at the time of the naturalization hearing in court (R. 113a-115a). Upon this testimony, clear and convincing evidence was found of materiality, intent to deceive and fraud.

The nondisclosure of 1930 and 1933 disorderly conduct convictions and of the 1944 indictment (subsequently nolle prossed) were considered wilful by the District Court and accordingly sufficient to constitute fraud as well as a basis for illegal procurement of naturalization (R. 14a). The second basis for illegal procurement was a convicition in 1951, (six years after naturalization) for conspiracy to operate an unregistered still in 1943 and 1944. The District Court found that this conclusively established bad moral character during the statutory period under the doctrine of *res judicata.* (R. 15a).

The District Court decreed denaturalization on July 13,

1953 upon the basis of fraud and illegality (R. 19a) and the Court of Appeals for the Third Circuit affirmed this judgment.

Reasons for Granting Certiorari

Denaturalization is a drastic penalty—perhaps more drastic than any other. Accordingly, the statutory basis for naturalization as well as proof of fraud or illegality should be clear. The importance of clarity in the interpretation of our denaturalization laws is accentuated by the many proceedings instituted under these laws during 1952 and 1953. On October 2, 1952, the Attorney General announced a deportation and denaturalization drive. According to the Staff Director of the Senate Immigration Committee there are presently 9,202 such denaturalization cases presently in process or under investigation.

Denaturalization decisions in the lower courts are in complete disagreement. On three issues presented herein the lower courts are in conflict.

1. The decision below in denaturalizing petitioner for lack of good moral character is contrary to the view of the Second Circuit which holds that the naturalization court's finding of good moral character is *res judicata*. *United States* v. *Bischof*, 48 F. 2d 538 (C. A. 2, 1931). [See also *United States* v. *Pandit*, 15 F. 2d 285 (C. A. 9, 1926, certiorari denied 273 U. S. 759) where *res judicata* was held applicable by the Ninth Circuit to the naturalization court's determination of racial eligibility.] In the instant case the naturalization court found that petitioner was a person of good moral character and if the rule of the Second and Ninth Circuit be followed, that issue may not be relitigated in a denaturalization proceeding.

2. The decision below sanctioned denaturalization for intrinsic fraud. Whether intrinsic fraud of this character covering past behavior and not relating to fraud in the

naturalization oath may authorize denaturalization was expressly reserved by this Court in *Knauer* v. *United States*, 328 U. S. 654 (1946).

Extrinsic fraud is the only type of fraud which traditionally vitiates judgments. *United States* v. *Throckmorton*, 98 U. S. 61, (1878); *Kobbe* v. *Benson*, 17 Wall 624 (1874). The doctrine has been held applicable to denaturalization cases contrary to the ruling below. *United States* v. *Gleeson* 90 Fed. 778 (C. A. 2, 1898); *United States* v. *Kusche*, 56 F. Supp. 201, 217, 218 (S. D. Calif., 1944).

In Senate Report 1515, 81st Cong. 1st Sess. page 756 it is said:

> "While it is clear that section 338(a) provides in terms for the revocation of naturalization because of fraud, the nature of the fraud involved and the effect of the finding of the naturalization courts as *res judicata* have been the source of considerable confusion and conflict in the law. The Supreme Court has yet to rule on the exact nature of the finding of the naturalization court.

3. The Court below predicated illegal procurement of naturalization upon (a) wilful nondisclosures and (b) upon a conviction six years after naturalization for misconduct during the statutory period. Petitioner believes that wilful nondisclosure was not supported by the evidence. Nor was the other basis for illegality sustained. The Second Circuit holds that illegal procurement relates to the procedural aspects of the naturalization process. *United States* v. *Bischof*, *supra*. The Third Circuit predicates illegal procurement upon sinister motive of the naturalization applicant. *United States* v. *Richmond*, 17 F. 2d 28 (C. A. 3, 1923); *United States* v. *Srednick*, 19 F. 2d 71 (C. A. 3, 1927)

Summarizing the existing law on illegality as a basis for denaturalization, Senate Report 1515, 81st Cong. 2d Session states at page 760:

> "The tables in the *Kusche case* [56 F. Supp. at 210] show the confusion existing in the courts as to the real basis for denaturalization. A difference of opinion also exists concerning the type of illegality which will constitute grounds for revocation, and the degree to which a finding of the naturalization court is *res judicata.*"

In addition to the foregoing issues which require clarification by this Court, there is presented for determination the question whether the decision below conforms to the requirements of *Knauer* v. *United States,* 328 U. S. 654 (1946); *Baumgartner* v. *United States,* 322 U. S. 665 (1944) and *Schneiderman* v. *United States,* 320 U. S. 118 (1943). These cases require clear, unequivocal and convincing proof to denaturalize—proof which leaves no troubling doubt, proof which does not leave evil purpose to conjecture.

In the instant case failure to reveal two disorderly conduct convictions outside the statutory periods was the basis for findings of intent to deceive, materiality and fraud contrary to the foregoing decisions of this Court and contrary to the holding of the Tenth Circuit in *Davis* v. *Commissioner of Internal Revenue,* 184 F. 2d 86 (C. A. 10, 1950). The finding of fraud from the alleged nondisclosure of an arrest subsequently nolle prossed, likewise lacked the solidity of proof required by this Court. The finding was not based upon clear and unequivocal proof nor upon documentary evidence, (the absence of which was not explained) but rather upon the nine year old memory of a witness who could only testify as to his invariable practice (R. 113a-115a). The materiality of this alleged non-disclosure, and intent to deceive were likewise here left to speculation and conjecture.

The findings of fraud were made the basis for a finding of illegal procurement. Instead of finding the naturalization judgment *res judicata* on moral character, the court below

found *res judicata* in a conviction six years after naturalization.

Conclusion

The confusion in denaturalization decisions under the 1940 Nationality Act which governs many pending cases requires enlightenment from this Court. The law governing deprivation of the precious right of American citizenship should not be permitted to rest in the state of conflict which presently pertains.

Respectfully submitted,

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